UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	SACV 15-00865 AG (SHKx)	Date	September 9, 2019
Title	HSINGCHING HSU v. PUMA BIOTECHNOLOGY, INC. ET AL.		

Present: The Honorable	ANDREW J. GUILFORD	
Melissa Kunig	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	

ORDER REGARDING PLAINTIFFS' MOTIONS FOR PREJUDGMENT INTEREST, APPROVAL OF NOTICE OF VERDICT AND CLAIMS ADMINISTRATION PROCEDURE, AND UNSEALING DOCUMENTS (DKT. NOS. 745, 748, 752)

This is a securities class action that went to trial in January 2019. A certified class of plaintiffs, led by Norfolk County Council, asserted claims against Defendant Puma Biotechnology for misleading investors about the effectiveness of a breast cancer treatment drug developed by Puma.

Plaintiffs now provide three memoranda of law in support of their three post-trial motions for: (1) an award of prejudgment interest (Dkt. No. 746, "Motion One"), (2) approval of notice of verdict and claims administration procedure (Dkt. No. 749, "Motion Two"), and (3) the sealing of documents (Dkt. No. 753, "Motion Three"). (collectively, "Motions".) To each of the Motions, Defendants filed oppositions (Dkt. Nos. 758, 752, 756) and Plaintiffs filed replies (Dkt. Nos. 775, 776, 774).

The Court GRANTS Motions One and Two and DENIES Motion Three.

1. BRIEF BACKGROUND

Puma owns the rights to a breast cancer treatment drug, neratinib (also called Nerlynx). At bottom, this case was about whether Defendants misrepresented neratinib's safety and effectiveness in a July 2014 investor call.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	SACV 15-00865 AG (SHKx)	Date	September 9, 2019
Title	HSINGCHING HSU v. PUMA BIOTECHNOLOGY, INC. ET AL.		

Following a two-week trial, a jury delivered a verdict in this case in February 2019. The jury found that for one of the four misrepresentations alleged by Plaintiffs, Defendants violated § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. They awarded $4.50 per share as damages for the misrepresentation. (Jury Verdict (Redacted), Dkt. 718.)

2. MOTION FOR AN AWARD OF PREJUDGMENT INTEREST

2.1 Legal Standard

Prejudgment interest serves a compensatory function, designed to make the injured party whole. *Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1441 (9th Cir. 1996). The decision whether to award prejudgment interest is left to the sound discretion of the trial court, guided by the factors from *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 (1989). Those factors include: (1) whether prejudgment interest is necessary to compensate the plaintiff fully for his or her injuries; (2) the degree of personal wrongdoing by the defendant; and (3) other fundamental considerations of fairness. *Id.* Prejudgment interest should not be "speculative" or provide a "windfall" to plaintiffs. *Knapp*, 90 F.3d at 1442.

Additionally, courts have broad discretion to determine what rate of interest to apply and when prejudgment interest begins. *See Columbia Brick Works, Inc. v. Royal Ins. Co. of Am.*, 768 F.2d 1066, 1068 (9th Cir. 1985). In deciding if and how much prejudgment interest should be granted, courts must examine matters encompassed within the merits of the underlying action. *Osterneck*, 489 U.S. at 176.

2.2 Analysis

2.2.1 Whether Prejudgment Interest Is Needed to Compensate Plaintiffs Fully for Injuries

Defendants argue that any prejudgment interest rate would "overcompensate class members" and be impermissibly speculative." (Dkt. No. 758 at 4-6.) Specifically, Defendants contend prejudgment interest would give class members "a return on investment that they never would have otherwise obtained" because awarding prejudgment interest assumes that on May 14, 2015, class members would have taken $4.50 per share and made a conservative investment, instead of a more risky investment in a company like Puma. (*Id.* at 5.)

Here, prejudgment interest is needed to fully compensate class members for the injury they suffered because of Defendants' fraud. The jury determined that Defendants personally and knowingly violated federal securities laws, which resulted in class members suffering damages of $4.50 per share of Puma stock bought or acquired between July 22, 2014 and May 13, 2015. (Dkt. No. 718.) Class members were deprived of the use and value of their money in the nearly four years since they were damaged by the fraud, and the award of prejudgment interest will right that wrong. *See Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 717 (9th Cir. 2004) ("prejudgment interest is, as a general matter, routinely available for willful violations of federal law") Defendants cite *In re Vivendi Universal*, S.A. Sec. Litig., 284 F.R.D. 144, 162 (S.D.N.Y. 2012) to argue that prejudgment interest is not appropriate because class members might have put their money in "risky" investments. (Dkt. No. 758 at 5.) But, even when the United States economy was three years into recession, that court awarded prejudgment interest holding that it was "necessary to fully compensate the class for their loss of use of the funds." *Vivendi,* 284 F.R.D. at 162. Thus, prejudgment interest is needed here to fully compensate class members.

2.2.2 Degree of Personal Wrongdoing by Defendants

Defendants next contend that in making false statements about neratinib's efficacy results, Defendants did not act "willfully." (Dkt. No. 758 at 7.) However, the jury found that "Plaintiffs prove[d] that Defendants acted knowingly in making the alleged false or misleading statement." (Dkt. No. 718.) Defendants made false statements about neratinib's efficacy results that artificially inflated Puma's stock price and the damages it caused to class members resulted from Defendants' personal action. Here, Defendants intentional violations of the federal securities laws support an award of prejudgment interest.

2.2.3 Fundamental Considerations of Fairness

Lastly, Defendants argue that "[f]undamental considerations of fairness further weigh against an award of prejudgment interest" because they "were not unjustly enriched" by the violations of securities laws. (Dkt. No. 758 at 8-10.) But there is not a requirement that a defendant be unjustly enriched in order to award prejudgment interest. *See Osterneck*, 489 U.S. at 176. The purpose of prejudgment interest is to make the victims of fraud whole, not simply to take

money from defendants. *See Knapp*, 90 F.3d at 1441. Here, the fair result is to make the victims of Defendants' fraud whole. None of the factors that would weigh against the presumptive award of prejudgment interest to the prevailing party—such as undue delay in prosecuting the lawsuit or the plaintiff having already been awarded damages in excess of what would have made plaintiff whole—are present here. Thus, the Court awards prejudgment interest to Plaintiffs.

2.2.4 The Appropriate Rate of Prejudgment Interest

Next, the Court determines the proper rate of prejudgment interest. Plaintiffs contend that prejudgment interest should be awarded at the rate provided by 26 U.S.C. § 6621(a)(2). However, the rate Plaintiffs request is generally applied by the Internal Revenue Service ("IRS") to penalize individuals and corporations for the underpayment of taxes as set forth in 26 U.S.C. § 6621.

Here, the post-judgment interest rate under 28 U.S.C. § 1961(a) is the more appropriate rate for prejudgment interest as well. *See W. Prac. Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984). The measure of interest provided in Section 1961 is the 52-week Treasury Bill rate. Awarding prejudgment interest at this rate—the rate applied in the *Vivendi* securities class action—would be in line with this default rule in the Ninth Circuit. *See W. Pac. Fisheries, Inc.*, 730 F.2d at 1289 ("the measure of interest rates prescribed for post-judgment interest in 28 U.S.C. § 1961(a) is also appropriate for fixing the rate for pre-judgment interest" in cases where the award of prejudgment interest is left to the discretion of the trial court "unless the judge finds on substantial evidence . . . the equities of the particular case require a different rate"); *SEC v. Olins*, 762 F. Supp. 2d 1193, 1199 (N.D. Cal. 2011) (finding the IRS rate is more appropriate for calculating prejudgment interest in an action brought by the SEC because it reflects "what it would have cost to borrow the money from the government" while the Treasury Bill rate referenced in Section 1961 "is the rate at which one lends money to the government."). Further, the Court finds that the Treasury Bill rate should be compounded annually as the statute provides. *See* 28 U.S.C. § 1961(b).

2.2.5 Conclusion

The Court awards prejudgment interest at the Treasury Bill rate under 28 U.S.C. § 1961(a), compounded annually, and running from May 14, 2015 through entry of final judgment. The Court GRANTS Motion One.

3. MOTION FOR APPROVAL OF NOTICE OF VERDICT AND CLAIMS OF ADMISTRATIVE PROCEDURE

Under Federal Rule of Civil Procedure 23(d)(1)(B), courts are authorized "to protect class members and fairly conduct the action" by authorizing notice to the Class about the relevant status of the action, the proposed extent of the judgment, and the rights the class members have. To carry out the claims procedure the Court must approve: (1) a proposed notice and claims schedule; (2) a claims administrator; (3) the notice procedures, including the notice of verdict and proof of claim form; (4) the process by which Defendants can challenge claims; and (5) the formula for calculating the total damages suffered by each claimant.

The Court has reviewed in detail the parties proposed orders approving the schedule and procedures for notifying class members of the verdict and administering the claims process.

3.1 Notice and Claim Schedule

First, the Court finds that Plaintiffs' proposed notice and claims schedule properly allows for the completion of the process for challenging claims. It also provides that the motion for the distribution of funds be filed 21 days after resolution of the challenged claims. Defendants' proposed changes to the schedule are unnecessary and would only cause delay to the detriment of damaged class members. The Court adopts Plaintiffs' following proposed schedule for notice of the verdict, claims administration, and briefing on fees and expenses.

Date	Action
21 days following the Order.	Claims administrator to publish and initiate mailing of the notice.
60 days following publication of the notice.	Claims administrator to provide parties with summary update on received claims. Updated summaries to be provided thereafter every 30 days.
120 days following publication of the notice.	Deadline to submit a claim.
180 days following the deadline to submit a claim.	Claims administrator to provide parties and file with the court a claims report listing all claims determined to be valid.
30 days after filing of the claims report.	Deadline for the parties to propose a process for challenging claims and/or a briefing schedule to address the process for challenging claims.
21 days after resolution of challenged claims.	Deadline for Plaintiffs to move for distribution of funds, attorney fees and expenses, and Lead Plaintiff award.
21 days before hearing on motion for distribution of funds, attorney fees and expenses and Lead Plaintiff award.	Deadline for objections to attorney fees and expenses and Lead Plaintiff award.
14 days before hearing on motion for distribution of funds, attorney fees and expenses, and Lead Plaintiff award.	Deadline for replies in support of motion for distribution of funds, attorney fees and expenses and Lead Plaintiff award.

3.2 Claims Administrator

As both parties request, the Court appoints the firm of Gilardi & Co. LLC ("Gilardi") as Claims Administrator. Gilardi was previously appointed by this Court as the Notice Administrator and administered the class notice plan. (Dkt. No. 261.) In addition to its familiarity with this matter, Gilardi has extensive experience serving as a claims administrator.

3.3 Notice of Verdict and Proof of Claim Form

Next, the Court approves Plaintiffs' proposed notice of verdict and proof of claim form. Like the procedures used in the settlement of a class action, class members will be notified of the verdict and given an opportunity to submit a claims form. Plaintiffs' proposed notice

concisely states the case status (a verdict in favor of Plaintiffs and the Class), the extent of the judgment (as reflected in the damages formula) and the class members rights (to file or not to file a claim, as well as to object to any fees or reimbursements sought). Defendants proposed edits would likely create confusion and inevitably delay the claims process. Defendants have not objected to any element of Plaintiffs' proposed proof of claim form.

3.4 Procedure for Challenging Claims

Plaintiffs set forth in detail their procedure for challenging claims. (Dkt. No. 749.) Defendants disagree with the proposed procedure by arguing that: (1) they are entitled to reasonable post-trial discovery from class members to rebut the presumption of individual reliance and (2) they did not waive the right to obtain reasonable discovery from class members. But Defendants could move for leave to take discovery and have not done so—nor have they identified any specific discovery to be taken. Without a motion identifying the specific discovery Defendants seek to take, the Court is unable to determine whether Defendants can meet the strict standard for leave under Rule 16. *See* Fed. R. Civ. P. 7(b)(1)(B)-(C) ("The motion . . . must state with particularity the grounds for seeking the order" and "state the relief sought.").

Thus, even if post-trial discovery were allowed, it is not possible to determine whether any proposed discovery is relevant or proportional to the needs of the case until Defendants have actually proposed it. The Court approves Plaintiffs' procedure for challenging claims.

3.5 Calculating Damages

Damages in securities fraud cases are generally measured under the out-of-pocket standard that states plaintiffs can recover "the differences between the inflated price paid and the value received, plus interest on the difference." *Blackie v. Barrack*, 524 F.2d 891, 908 (9th Cir. 1975). The Supreme Court in *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342-43 (2005), explained that out-of-pocked damages are calculated by looking at the amount the stock price declined after the correction disclosure revealing the fraud.

While the Securities and Exchange Act of 1934 ("Exchange Act") did not identify a specific formula for calculating damages (or require that damages be measured by a plaintiff's out-of-

pocket loss on the shares purchased), the Private Securities Litigation Reform Act of 1995 ("PSLRA") provides that where damages are established by reference to the market price of the security, the following formula shall be used:

> [T]he award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.
>
> If the plaintiff sells or repurchases the subject security prior to the expiration of the 90-day period described in paragraph (1), the plaintiff's damages shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the security and the mean trading price of the security during the period beginning immediately after dissemination of information correcting the misstatement or omission and ending on the date on which the plaintiff sells or repurchases the security.

15 U.S.C. § 78u-4(e)(1)-(2).

The jury determined that Defendants' fraudulent conduct caused class members to suffer damages of $4.50 per share. (Dkt. No. 718.) Given the jury's finding that Puma's stock price was artificially inflated at al times during the class period, as well as the sharp decline in Puma's stock price in the 90 days following the disclosure of the truth about neratinib's effectiveness, the Court finds that Plaintiffs' application of the PSLRA damages formula is proper:

(1) For all shares purchased or acquired during the period between July 22, 2014 (after 6:00 PM EDT) and May 13, 2015 at prices above $193.31 per share ***or*** held through June 11, 2015, damages are $4.50 per share, plus interest;

(2) For all shares purchased during the period between July 22, 2014 (after 6:00 PM EDT) and May 13, 2015 at prices below $193.31 per share ***and*** sold between May

14, 2015 and June 11, 2015, damages shall be the lesser of $4.50 per share or the purchase price minus the average closing price between May 14, 2015 and the date of sale;

(3) For all shares purchased during the period between July 22, 2014 (after 6:00 PM EDT) and May 13, 2015 and sold on or before May 13, 2015, the damages are zero; and

(4) For all shares purchased between May 14, 2015 and May 29, 2015, the damages are zero.

Defendants do not object to Plaintiffs' per share damages formula and do not dispute that the formula fully accords with the statutory measure of damages under the PSLRA. Instead, Defendants objections concern the discretionary issue of whether to apply the first-in-first-out method ("FIFO") or the last-in-first-out method ("LIFO") for matching when purchased shares are sold. (Dkt. No. 754 at 16.) Plaintiffs contend FIFO is most appropriate, and Defendants prefer LIFO. (*Id.*) Defendants also want the damages formula to include a non-statutory offset for shares that were purchased outside the class period and then sold in it. (*Id.* at 20-24.)

The Court finds that LIFO is the more appropriate method for matching shares sold during the class period because LIFO accounts for profits resulting from class period sales. Courts prefer LIFO because FIFO often ignores necessary offsets. As cited by Defendants, "the majority of courts that have adjudicated this issue prefer LIFO 'and have generally rejected FIFO as an appropriate means of calculating losses in securities fraud cases.'" (Dkt. No. 754 at 17); *Vivendi*, 284 F.R.D. at 160. Further, as agreed to by the parties, shares purchased on July 22, 2014 at or below $195 per share will be deemed to have been made before 6:00 PM EDT and not during the class period unless the claimant can prove otherwise. (Dkt. No. 776 at 25.)

3.6 Conclusion

The Court: (1) approves Plaintiffs' proposed notice and claims schedule; (2) appoints the firm of Gilardi & Co. LLC as Claims Administrator; (3) approves Plaintiffs' proposed notice of

verdict and proof of claim form; (4) approves Plaintiffs' procedure for challenging claims; and (5) finds that Plaintiffs' application of the PSLRA damages formula is appropriate but finds that LIFO is the more appropriate method for matching shares sold during the class period. The Court GRANTS Motion Two.

4. MOTION FOR UNSEALING DOCUMENTS

In the many documents filed with the Court, the parties included numerous redactions. Post-trial, Plaintiffs ask the Court to unseal 35 documents from Defendants' summary judgment and motion *in limine* exhibits. (Dkt. No. 774 at 1.)

Previously, Defendants opposed the unsealing of these documents, saying that Puma's proprietary and competitively sensitive information, along with certain bank documents, should remain under seal. (Dkt. No. 459.) Several non-party investment banks had also opposed the request. (Dkt. No. 454.) Now, Defendants argue that "nothing has changed to justify departure from the Court's prior determination that compelling reasons justify sealing these documents from public view." (Dkt. No. 756 at 3-4.) Defendants add that during the meet-and-confer process leading up to this motion, they "undertook a comprehensive review of the documents identified by Plaintiffs and agreed to unseal the vast majority of them." (*Id.*) at 1.

Considering the parties' arguments and their good faith effort to reduce the number of filings under seal, the Court DENIES Motion Three.

5. DISPOSITION

The Court GRANTS Motions One and Two and DENIES Motion Three.

: 0

Initials of Preparer mku